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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 430

UNITED STATES OF AMERICA, ON RELATION OF JAMES W. MOBLEY, PETITIONER

v.

GENERAL THOMAS T. HANDY, COMMANDING OFFICER, FORT SAM HOUSTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 32-35) is reported at 176 F. 2d 491.

JURISDICTION

The judgment of the Court of Appeals was entered August 2, 1949 (R. 35). The petition for a writ of certiorari was filed October 28, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether court-martial jurisdiction, once obtained over a civilian employee of the United States Army in Germany, not in time of war, is lost when such civilian breaches his arrest and restriction to the Army post in Germany and returns to the United States.

STATUTES INVOLVED

Article of War 2, 10 U.S.C. (1946 ed.) 1473, Act of June 4, 1920, c. 227, subch. II, § 1, 41 Stat. 787, provides:

> The following persons are subject to these articles and shall be understood as included in the term "any person subject to military law," or "persons subject to military law", whenever used in these articles: * * *
>
> * * * * *
>
> (d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles;

Article of War 69, 10 U.S.C. (1946 ed.) 1541, Act of June 4, 1920, c. 227, subch. II, § 1, 41 Stat. 802, provides:

> Any person subject to military law charged with crime or with a serious offense under these articles shall be placed in confinement or in arrest as circumstances may require; but when charged with a minor offense only such person shall not ordinarily be placed in confinement. Any person placed in arrest under the provisions of this article shall thereby be restricted to his barracks, quarters, or tent, unless such limits shall be enlarged by proper authority. Any officer or cadet who breaks his arrest or who escapes from confinement, whether before or after trial or sentence and before he is set at liberty by proper authority, shall be dismissed from the service or suffer such other punishment as a court-martial may direct; and any other person subject to military law who escapes from confinement or who breaks his arrest, whether before or after trial or sentence and before he is set at liberty by proper authority, shall be punished as a court-martial may direct.

Article of War 96, 10 U.S.C. (1946 ed.) 1568, Act of June 4, 1920, c. 227, subch. II, 41 Stat. 806, provides:

> Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial,

according to the nature and degree of the offense, and punished at the discretion of such court.

STATEMENT

In a petition for a writ of habeas corpus filed in the District Court for the Western District of Texas, petitioner alleged that after his honorable discharge from the United States Army in April 1946, he was employed as a civilian in the Army Post Exchange at Frankfort, Germany; that on or about July 31, 1948, he was arrested by the United States military authorities, confined in jail, and shortly thereafter charged with violating AW 96, *supra,* in that he used cigarette ration coupons as money while serving as such civilian employee (R. 2-3); that after his release from jail at Frankfort he continued to serve as such civilian employee until on or about November 1, 1948, when he was discharged from such employment by the military authorities (R. 3-4); that on or about December 20, 1948, he left Paris, France, by airplane and came to the United States (R. 3); that after settling in Houston, Texas, he was, on or about March 28, 1949, arrested by military police for return to Germany for trial on the charges filed in July 1948; that he was taken to Fort Sam Houston, Texas, and placed in a military prison; that his arrest in Houston was without legal authority and an attempted exercise by the United States Army of a jurisdiction which had terminated on November 1, 1948, when

he was discharged as a civilian employee of the Army in Frankfort (R. 5).

In respondent's return to an order to show cause for petitioner's restraint (R. 6), it was stated that petitioner was suspended from duty status as an employee of the Frankfort post exchange on August 2, 1948, and that on August 5, 1948, by order of the Commanding General of Frankfort Military Post, he was placed under arrest and restricted to the geographical limits of the post and was required by the terms of the restriction to report each morning to the Provost Marshal pending the outcome of court martial charges initiated against him (R. 8, 12); that petitioner was notified of this restraint on the same date and acknowledged his willingness to comply with it (R. 11); that the arrest and restriction of August 5, 1948, were imposed upon petitioner pending investigation of court-martial charges under AW 96 involving 13 specifications;[1] that the charges were signed and sworn to on August 27, 1948, the investigation under AW 70 was completed on or about November 15, 1948, and on December 9, 1948, the charges were referred to a general court-martial for trial; that on December 10, 1948, a copy of the charges was served on petitioner; that petitioner's final separa-

[1] Petitioner was charged with appropriating for his own use tobacco rationing coupons, unlawfully appropriating and selling, between April 15 and July 31, 1948, approximately 19,600 cartons of cigarettes intended for use by the United States Army, and embezzling 2,800 cartons of cigarettes entrusted to him as an employee of the post exchange (R. 9, 11-12).

tion from employment with the European Command Exchange System was not effected until after he had breached his arrest and restraint on or about December 22, 1948, by departing from the geographical limits of the Frankfort Military Post (R. 9, 12); and that petitioner was arrested in Houston, Texas, on or about March 28, 1949, by order of the Provost Marshal General of the United States Army, for return to the European Command to stand trial on the charges pending against him (R. 10, 14).

In an amended traverse, petitioner denied that on or about August 5, 1948, there was a lawful order of the Commanding General of Frankfort Military Post for his arrest; denied that there was any lawful arrest or restriction in force against him on or about December 22, 1948, and denied that he breached any arrest or restraint; admitted that on or about August 5, 1948, he was shown a letter advising him of his confinement to the Frankfort Military Post and requiring him to report personally each day to the Provost Marshal; stated that he did not have sufficient information to form a belief as to the number of specifications in the court-martial charges against him but admitted that he understood the charges were under Article of War 96 for misappropriation or misapplication of cigarette coupons and ration tickets; and stated that he did not have sufficient information to admit or deny that the court-martial charges were re-

ferred to a general court-martial for trial on December 9, 1948, with a copy of said charges being served on him, but admitted that some character of paper was served on him on or about December 10, 1948 (R. 18-20).

On the basis of the facts shown by these pleadings, the District Court denied the petition for a writ of habeas corpus, holding that the Department of the Army had authority to arrest petitioner in Frankfort, Germany, and hold him for trial by court-martial for the offenses charged under AW 96, that nothing had occurred since his arrest and restriction to divest the Department of such authority, and that the Department had authority to arrest him on March 28, 1949, and to hold him for trial by court-martial (R. 22-23). The order of the District Court was affirmed by the Court of Appeals for the Fifth Circuit (R. 35).

ARGUMENT

Petitioner does not seem to deny that he was subject to the Articles of War while he was employed by the Army in a civilian capacity at the post exchange in Frankfort, Germany. He contends, however, that since military jurisdiction in time of peace over civilians "accompanying or serving with the armies of the United States" is limited to such persons so serving "without the territorial jurisdiction of the United States" and extends to civilians serving within the United States only in time of war (AW 2(d), *supra,* p.

2), the military authorities in Germany had no jurisdiction over his person at the time of his arrest in Houston, Texas, "because he was not physically present in Germany," and the military authorities in the United States had no jurisdiction "because, not being in time of war, all civilians in the United States were subject alone to civil jurisdiction" (Pet. 12).[2] The trouble with this argument is that it ignores the fact that petitioner was subject to trial by court-martial for the offenses which he was charged with having committed while serving as a civilian employee of the Frankfort post exchange and that court-martial jurisdiction to try him for such offenses had attached before he fled. Petitioner's breach of his arrest and his flight to the United States, after the charges had been referred for trial by court-martial and served upon him, did not defeat that jurisdiction so as to preclude his arrest in the United States and return to Germany for trial.

While we have found no authorities precisely in

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[2] S. J. Res. 123, approved and effective July 25, 1947, c. 327, sec. 3, 61 Stat. 449, 451, 452, provides:

"In the interpretation of the following statutory provisions, the date when this joint resolution becomes effective shall be deemed to be the date of the termination of any state of war heretofore declared by the Congress and of the national emergencies proclaimed by the President on September 8, 1939, and on May 27, 1941;

* * * * * *

"Chapter II, articles 2(d), 48, 58, 59, 74, 75, 76, 77, 78, 79, 104, and 119 of the Act of June 4, 1920 (41 Stat. 759, ch. 227) [the 1920 Articles of War]."

Thus, we were at peace within the meaning of Article 2(d) during the period involved in this case.

point, the case is governed by settled general principles. Petitioner's flight after referral of the charges for trial suggests the analogy of a fugitive from an indictment duly returned in a federal district court. Such a person is subject to arrest wherever he is found within the jurisdiction of the United States (Rules 4(c)(2) and 9, F. R. Crim. P.) and to summary removal to the district where the prosecution is pending merely upon production of a certified copy of the indictment and proof that the defendant is the person named therein (Rule 40(b)(3)). There are no analogous provisions in military law, but AW 69, *supra*, pp. 2-3, provides that "Any person subject to military law charged with crime or with a serious offense under these articles shall be placed in confinement or in arrest." Obviously, this authority extends to any place where the offender may be found within territory where military authority exists and also includes authority to remove him to the place of trial.[3] A prisoner arrested pursuant to

[3] Neither are there any venue provisions in military law. *A Manual for Courts-Martial* (1928 ed.), which was in effect at the time of the proceedings in Frankfort, provided that "courts should be assembled at posts or stations where trial will be attended with the least expense and delay" (par. 36, p. 27). There is no similar provision in *Manual for Courts-Martial, U. S. Army, 1949*, effective February 1, 1949. See *Hironimus* v. *Durant*, 168 F. 2d 288 (C.A. 4), certiorari denied, 335 U. S. 818, and *Durant* v. *Hiatt*, 81 F. Supp. 948 (N. D. Ga.), where officers on terminal leave were arrested in the United States and returned to Germany for trial. In the latter case the trial began and ended in Germany but part of it was held in Washington, D. C. This action was sustained against the contention that the court-martial lost jurisdiction by reason of its moving to Washington (81 F. Supp. at 949-950, 955-956).

AW 69 cannot defeat such jurisdiction by his own act of violating the conditions of his arrest. For it is a general principle that once jurisdiction attaches, "it cannot be divested by mere subsequent change of status." *Carter* v. *McClaughry*, 183 U. S. 365, 383.

Thus, in *Barrett* v. *Hopkins*, 7 Fed. 312, 315 (C.C. D. Kansas), cited with approval in the *Carter* case, proceedings against a soldier had been "instituted while he was clearly within the jurisdiction of the military authority, by the preferring of the charges, and by his arrest, as well as by the forwarding of the charges to headquarters, with an application for the appointment of a court-martial for his trial," and the question was whether jurisdiction to try him ceased after the expiration of the term of his enlistment. In holding that it did not, the court said:

> The general rule is that when the jurisdiction of a court attaches in a particular case by the commencement of proceedings and the arrest of the accused, it will continue for all the purposes of the trial, judgment, and execution.[4]

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[4] In *Hirshberg* v. *Cooke*, 336 U. S. 210, while holding that a Navy court-martial has no jurisdiction to try an enlisted man for an offense committed during a prior enlistment terminated by an honorable discharge, even though he re-enlisted on the day following his discharge, the Court adverted to the prior Navy opinion and the prevailing Army view that courts-martial were without jurisdiction "to try their personnel for offenses committed prior to an honorable discharge *where proceedings had not been instituted before discharge*" (pp. 216-217; italics supplied).

The same provisions of AW 69 which authorized petitioner's arrest in the first instance also authorized his rearrest in Texas, after he had breached his arrest, for removal to Germany for trial on the charges pending against him. During, as well as before, his arrest, he was subject to military jurisdiction. Cf. *Carter* v. *McClaughry, supra.* Indeed, in breaching his arrest, he violated the further provision of AW 69 that "any other person subject to military law [i.e., other than an officer or cadet] who escapes from confinement or who breaks his arrest, whether before or after trial or sentence and before he is set at liberty by proper authority, shall be punished as a court-martial may direct."[5]

Nothing in AW 2(d), upon which petitioner relies, shows that the Army authorities exceeded their powers in rearresting him for return to Germany for trial. That article simply describes the persons who are subject to the Articles of War and, as to civilians, the territorial scope of that jurisdiction in times of war and peace. Petitioner does not deny that he was subject to the articles at the time of the offenses charged against him and that jurisdiction to try him for such offenses had attached long before his flight to the United States. The fact that in March 1949, when be was re-

[5] It does not appear, however, that petitioner has been charged with this offense. The order for his arrest specified that he was to be returned to Germany for trial on the pending charges (R. 14).

arrested in Texas, we were at peace within the meaning of AW 2(d), and that civilians serving with the Army within the United States were not subject to the articles, does not defeat that jurisdiction. Petitioner cannot, by his own wrongdoing, gain the benefit of a provision which was wholly inapplicable to him at the time of his arrest.

Neither is there any merit in petitioner's contention (Pet. 15-17) that his discharge from employment with the Frankfort Post Exchange liberated him from the arrest and restraint imposed upon him in August 1948 and in some way terminated military jurisdiction to try him.[6] He does not claim that he was released from arrest and it is clear, on the contrary, that his restriction to the geographical limits of the Frankfort Military Post continued in effect (see R. 11).[7] Here again

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[6] Petitioner alleged that he was separated from this employment on November 1, 1948 (R. 3-4). It appears from respondent's return that he was not finally separated until after he had breached his restraint in December 1948 (R. 12). As will appear in the text, we think it is immaterial whether the separation occurred before or after petitioner's flight.

[7] Petitioner's contention that this restraint "was moral, not legal" (Pet. 15) and, hence, that court-martial jurisdiction did not thereby attach is frivolous, and the cases he cites to support his postulate that the restraint was only moral are wholly inapposite. Those cases (*Wales* v. *Whitney*, 114 U. S. 564; *Van Meter* v. *Sanford*, 99 F. 2d 511 (C.A. 5); *Ex Parte Ventura*, 44 F. Supp. 520 (W. D. Wash.)) merely held that habeas corpus will not lie on behalf of a person not under physical restraint. Petitioner was placed under arrest and his restriction to the geographical limits of the post was expressly authorized by the provision of AW 69 that "Any person placed in arrest under the provisions of this article shall thereby be restricted to his barracks, quarters, or tent, unless such limits shall be enlarged by proper authority." Furthermore, the attachment of juris-

the principle that jurisdiction once attached is not defeated by a subsequent change of status is fully applicable. There is no provision of law, so far as we are aware, which required the Army to keep paying petitioner his salary, even after his arrest for the theft of over 20,000 cartons of cigarettes, as a condition essential to the continued maintenance of jurisdiction.

In the instant case, petitioner was separated from his employment after the commission of the offenses charged against him and after court-martial jurisdiction had attached. In other situations, courts have sustained court-martial jurisdiction over civilians who had accompanied or served with the Army in foreign territory and had committed offenses after their discharge but before their return to the United States. Thus, in *Perlstein* v. *United States,* 151 F. 2d 167 (C.A. 3), certiorari granted, 327 U. S. 777, dismissed as moot, 328 U. S. 822, a civilian employee of a contractor engaged in salvage operations in Massawa, Eritrea, as part of an Army project was ordered to be discharged and sent back to the United States at the earliest opportunity. On September 26, 1942, the day he was to board an Army ship for return to the United States, he was alleged to have stolen jewelry and forged a receipt for it. After he left Massawa the theft was discovered, he was arrested in Twefik,

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diction had advanced far beyond the stage of arrest before petitioner's flight and discharge: the charges had been investigated and referred for trial.

Egypt, tried, and convicted by court-martial. It was held that the fact of his discharge from his civilian employment prior to his offense and trial did not terminate court-martial jurisdiction over him since he was still a person "accompanying" the Army within the meaning of AW 2(d). See also *In re Di Bartolo,* 50 Supp. 929 (S.D. N.Y.); *Ex parte Gerlach,* 247 Fed. 616 (S.D. N.Y.).

Here, on the other hand, petitioner was more than a person accompanying the Army. He was actually employed by and serving with the Army in foreign territory and thus, under AW 2(d), was subject to the Articles of War; the offenses charged against him were committed while he was so employed; and he was arrested and charged with those offenses and court-martial proceedings had thus been commenced. Neither the subsequent separation from his employment nor his breach of arrest and flight to the United States destroyed the jurisdiction of the Army to rearrest him for trial on charges validly instituted.

CONCLUSION

The decision below is correct and there is no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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